Supreme Court, U.S.
FILED
FEB 16 2001
OFFICE OF THE CLERK

No. 00-1166

In The

# Supreme Court of the United States

ROSA M. TOWNSEND,

*Petitioner,*

v.

KNIGHT-RIDDER, INC. and
THE MIAMI HERALD PUBLISHING CO.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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23 pp

## RESTATEMENT OF THE QUESTION PRESENTED

Whether this Court should review the Eleventh Circuit's per curiam affirmance without opinion of an unpublished district court's summary final judgment where the standard applied by the district court was in accord with the law of the Eleventh Circuit and the majority of the other circuits.

## PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondent Knight-Ridder, Inc. is a publicly-held company and the parent of respondent The Miami Herald Publishing Company.

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## RESPONDENTS' BRIEF IN OPPOSITION

This Court should deny the Petition for Writ of Certiorari, which seeks review of the Eleventh Circuit's per curiam affirmance without opinion of the unpublished summary final judgment entered by the district court.

## RESTATEMENT OF THE CASE

### Ms. Townsend's Evaluation and Termination

From June 1988 until May 1998, Rosa Townsend was a local political news reporter for *el Nuevo Herald*, a Spanish language insert to *The Miami Herald*, a major metropolitan newspaper. The two newspapers were, and are, operated as separate entities. Their newsrooms are located on separate floors and are managed by different editors. The staffs are different; the budgets are separate; and all hiring, firing, and promotion decisions are made independently by the supervisors at the two respective papers.

In the Fall of 1997, Ms. Townsend's supervisor, Assistant City Editor Gladys Nieves, began to prepare Ms. Townsend's performance evaluation. Ms. Nieves left *el Nuevo Herald* before completing it, so Ms. Townsend's new supervisor, Mr. Cabaleiro, and his boss, Mr. Casares, the City Editor, finished the evaluation. They then met with Ms. Townsend in early March 1998 to discuss it and give her a raise. The meeting took two hours. The evaluation reflected that Ms. Townsend had both strengths and weaknesses: her supervisors described her as hard working, aggressive, and initiating with good research skills

and good instincts. But they also wrote that she had problems organizing her time, writing concisely and clearly, and working with her peers and as part of a team. She needed to become a leader, coach less experienced reporters, anchor more stories, complete her stories more quickly, and diversify her writing style and written product. She was given a 6.5% salary increase.

Ms. Townsend did not agree with her evaluation. She did not believe that she had deficiencies or needed to improve. She did not accept the criticisms and refused to sign the evaluation. Instead, she demanded a promotion from Reporter 3 to Reporter 4, the highest classification for reporters at *el Nuevo Herald*.

After the meeting, Mr. Casares consulted with his superiors at *el Nuevo Herald*, Mr. Fabricio, the Managing Editor, and Ms. Gutierrez, the Executive Editor, regarding Ms. Townsend's evaluation and promotion demand. They confirmed that Ms. Townsend's evaluation, raise, and job classification were fair and appropriate.

A day or two after her evaluation, Ms. Townsend went to see the Publisher, Alberto Ibargüen, to complain. She told him that her evaluation was wrong and unfair, that Mr. Casares was plotting with Ms. Gutierrez to ruin her career, and that Mr. Casares' arrogant management style was bad for the newspaper. She also claimed that the reason Gerardo Reyes (a reporter for *The Miami Herald*) was a Reporter 4 but she was only a Reporter 3 was because she was a woman. Mr. Ibargüen responded that he did not believe that her evaluation and job classification, which had been unanimously approved by the

entire chain of command, were discriminatory. He nonetheless promised to discuss the evaluation with her editors.

Mr. Ibargüen spoke to Ms. Townsend's editors, as he had promised. As a result, the next month, in April 1998, Mr. Casares and Mr. Fabricio met with Ms. Townsend. They presented to her a memorandum they had prepared (and which reflected the unanimous position of all of her supervisors) outlining the improvements she would need to make to be promoted. They promised to support her and to help her reach her goal of becoming a Reporter 4. During this unprecedented, two-hour meeting, Ms. Townsend was extremely emotional; she was also hostile and disrespectful to Mr. Casares, referring to him at one point as being "incompetent." She repeatedly said things such as "I can't accept this," "This is unacceptable to me," and "I will not take it." When Mr. Fabricio reported this meeting to his boss, Ms. Gutierrez, she told him he should have terminated Ms. Townsend "on the spot" for "insubordination."

Ms. Townsend went to see Mr. Ibargüen to complain – again. This time she told him that the conditions "imposed" on her were intolerable and that she would not work under them. She did not mention *The Miami Herald* reporter, Gerardo Reyes, or make any reference to discrimination. After this meeting, Mr. Ibargüen again spoke with the editors, who, again, all agreed that Ms. Townsend's evaluation and the decision not to promote her were fair.

A few weeks later, Ms. Townsend returned from vacation and went to see Mr. Ibargüen for a third time.

He told her that it was the consensus of the three editors that she was properly categorized as a Reporter 3 and that no one perceived there to be any mistreatment of her. When she questioned him about her "alternatives," he told her that if she could not accept her evaluation and her supervisors' offers of help, he would, with disappointment, accept her resignation.

After this meeting, Mr. Fabricio told Mr. Ibargüen that he did not believe that Ms. Townsend would ever accept her evaluation or accept Mr. Casares as her boss and that he believed that she would be a continuing disruption in the newsroom. He added that he thought she should be terminated. Ms. Gutierrez told Mr. Ibargüen that she had reached the same conclusion. The three managers then determined that, due to Ms. Townsend's adamant refusal to accept her evaluation and the "conditions" for promotion and because of her ultimatum that she would not work unless she was made a Reporter 4, they would terminate her employment.

**The Lawsuit and Summary Judgment**

Ms. Townsend sued the newspaper, pleading, among other things, discrimination and retaliatory discharge. She alleged that she was just as qualified as Gerardo Reyes, a male, international reporter for *The Miami Herald*, who was classified as a Reporter 4. Although she claimed that Mr. Reyes was her "comparator," she admitted that she knew very little about what he did. His affidavit, filed in support of the defendants' motion for summary judgment, showed that there was ***no comparison*** between his job and Ms. Townsend's. She was a

reporter of local Miami politics and politicians. The focus of his reporting was international – not local – and required him to travel extensively to South and Central America and Mexico. His job required an extensive knowledge of Latin American government and politics, contacts at high levels of government and business, knowledge of the countries' cultures and legal systems (Reyes was a lawyer in Colombia), and highly placed, credible sources, official and otherwise. He had won the highest prize awarded in the United States to Hispanic journalists and three times had won the highest prize given in Colombia for investigative journalism. And he had authored the only Spanish language book written on investigative journalism in Latin America. As the district court noted, "Ms. Townsend did not present any evidence that her job required specialized knowledge or skills comparable to those required for Mr. Reyes' position." (App. to Pet. at 14a.)

The defendants moved for summary judgment because, among other grounds, Ms. Townsend had failed to present sufficient evidence to support a *prima facie* case on any of her discrimination and retaliation claims and because, even if she had, she could not rebut *el Nuevo Herald's* legitimate and non-discriminatory reasons for firing her.

The district court granted the defendants' summary judgment motion in a sixteen-page, unpublished opinion. The district court concluded, among other things, that Ms. Townsend had failed to prove a *prima facie* case of retaliation because her

> claims of discrimination were not objectively reasonable. Ms. Townsend's claims for wage discrimination and failure to promote are based entirely on her own belief that her job is comparable to that of Mr. Reyes and that she therefore should have been promoted to Reporter 4. Yet, Ms. Townsend concedes that she knew little about Mr. Reyes' background and day-to-day activities before she brought this lawsuit. Mr. Reyes works for a different publication, travels internationally for his stories, and has specialized knowledge and contacts in his field of Latin American journalism. Ms. Townsend, although a commendable local reporter, has not demonstrated any such specialized skills or additional efforts in her job. Furthermore, ***Ms. Townsend offers no evidence outside of her own assertions to counter her supervisors' unanimous opinion that she is not ready to be promoted to Reporter 4***. Her supervisors gave her specific reasons for denying her promotion and even offered to assist her on improving on her weaknesses. In sum, ***there is nothing in the record that ties her supervisors' decisions to sex discrimination***. (App. to Pet. at 24a; emphasis added.)

The Eleventh Circuit – without opinion and without dissent – affirmed.

## REASONS FOR DENYING THE WRIT

Petitioner claims that there is a "split" between the Tenth and the Eleventh Circuits on the standard to be applied when determining whether a plaintiff has met her burden of showing a *prima facie* case of retaliation.

She claims that the Eleventh Circuit (although it affirmed without opinion) applied the objective "good faith, reasonable belief" standard to her retaliation claim, while the Tenth Circuit would have applied a subjective "mistaken, good faith belief" standard.

This Court should deny Ms. Townsend's petition for several reasons. First, the Eleventh Circuit's per curiam affirmance ***without opinion*** of the district court's unpublished summary final judgment did not "conflict" with published Tenth Circuit decisions. Second, the district court, in its ***unpublished order***, merely applied the standard that is well established in the Eleventh Circuit and widely accepted by most of the other federal courts, including at least two Tenth Circuit panels. And finally, even if the district court had applied to Ms. Townsend's retaliation claim the subjective good faith standard used by Tenth Circuit judges, the result would have been the same because *el Nuevo Herald's* reasons for terminating her were legitimate, nondiscriminatory, and unrebuttable.

## I.

### The Eleventh Circuit's Per Curiam Affirmance Without Opinion Did Not Create A Conflict

Disappointed that her nonmeritorious discrimination and retaliation claims were rejected by the district and the circuit courts below, the petitioner, by asserting that the Eleventh Circuit's per curiam affirmance of the summary judgment against her "conflicts" with Tenth Circuit rulings, hopes to entice this Court to intercede. But the Eleventh Circuit simply affirmed the district court; it did not say why. While a fair inference to be drawn from the

Eleventh Circuit's decision is that it approved of the district court's application of the objective good faith, reasonable belief standard to Ms. Townsend's retaliation claim, the fact remains that it is just an inference. And even the petitioner does not claim that the decision in this case necessarily stands for that or any other proposition. Instead she relies on Eleventh Circuit decisions in *other cases* to provide the basis for conflict. Thus, neither the record nor the Petition supports Ms. Townsend's assertion that a conflict exists between the decision of the Eleventh Circuit in this case and any other circuit court decision.

## II.

**The Standard the Courts of the Eleventh Circuit Apply When Determining Whether a Plaintiff Has Met Her Burden of Proving a Prima Facie Case of Retaliation Is the Same Standard the Majority of the Federal Courts Apply and That Two Panels of the Tenth Circuit Have Applied**

"Title VII prohibits an employer from discriminating against an employee who has opposed what she believes to be unlawful discrimination." *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1494 (11th Cir. 1989) (citing 42 U.S.C. § 2000e-3(a) (1981)). To meet her burden of proving a *prima facie* case of retaliatory discharge under the "opposition" clause of Title VII, 42 U.S.C. § 2000e-3(a), a plaintiff must show that (1) she engaged in protected opposition to discrimination; (2) she was terminated simultaneously with or subsequent to such opposition; and (3) there was a causal link between the

protected opposition and the termination. *Tipton*, 872 F.2d at 1494.

To meet the first prong of her *prima facie* case the plaintiff must show that her opposition to the perceived discrimination is "protected." *Id.* In the Eleventh Circuit this burden is met if the plaintiff "could ***reasonably*** form a ***good faith*** belief that the discrimination in fact existed." *Id.* (emphasis added). *See also Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999) (noting that "an employee who seeks protection under the opposition clause must have a 'good faith, reasonable belief' that her employer has engaged in unlawful discrimination"); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454 (11th Cir. 1998) (ruling that employee "had a good faith, reasonable basis" for filing her EEOC charge); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1388 (11th Cir.) (ruling that plaintiffs' belief that employer's grooming policy violated Title VII's prohibition against sex discrimination "was not reasonable"), *cert. denied*, 525 U.S. 1000 (1998); *Rollins v. State Dept. of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989) (recognizing that 42 U.S.C. § 2000e-3(a) "shields an employee from retaliation regardless of the merit of her complaints so long as she can show ***a good faith, reasonable belief*** that the challenged practices violate Title VII") (emphasis added).

The Eleventh Circuit, in *Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956 (11th Cir. 1997), emphasized that the good faith, reasonable belief showing required for a retaliation claim under Title VII's opposition clause has "both a subjective and an objective component." *Id.* at 960. The court explained:

> A plaintiff must not only show that [s]he subjectively (that is, in ***good faith***) believed that h[er] employer was engaged in unlawful employment practices, but also that h[er] belief was ***objectively reasonable*** *in light of the facts and record presented.*

*Id.* (emphasis added).

An employee need not prove the underlying claim of discrimination that allegedly led to her "opposition." *Tipton*, 872 F.2d at 1494; *Little*, 103 F.3d at 960 (concluding that a plaintiff "need not prove the underlying discriminatory conduct that [s]he opposed was actually unlawful in order to establish a prima facie case and overcome a motion for summary judgment"). Thus, when determining whether a plaintiff has met her *prima facie* case, the courts need only determine that the plaintiff's alleged perception that the employer engaged in discriminatory conduct was reasonable in light of the surrounding facts and circumstances – and honest; the plaintiff need not prove that her employer actually discriminated.

The "good faith, reasonable belief" standard that the Eleventh Circuit applies in opposition cases is the one the majority of federal circuit courts apply. *See, e.g., Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 159 (2d Cir. 1999) (holding that "a plaintiff need not establish that the conduct he opposed was actually a violation of [Title VII] so long as he can establish that he possessed a 'good faith, reasonable belief that the underlying challenged actions of the employer violated that law' ") (citations omitted); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1180 (2d Cir. 1996) (affirming jury's finding that plaintiff "reasonably and in good faith believed that she had been the

victim of a species of sex discrimination"); *Manoharan v. Columbia Univ. Coll. of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988) (stating that "the plaintiff must demonstrate a 'good faith, reasonable belief that the underlying challenged actions of the employer violated the law' ") (citations omitted); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 429 (5th Cir. 2000) (affirming district court's finding that plaintiff failed to present sufficient evidence showing that his alleged complaints of race discrimination were ***objectively reasonable***); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981) (adopting the "reasonable belief test" and concluding that "a plaintiff can establish a prima facie case of retaliatory discharge under the opposition clause of section 704(a) if he shows that he had a ***reasonable belief*** that the employer was engaged in unlawful employment practices") (emphasis added); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir.) (stating that "[u]nder Title VII, an employee is protected against employer retaliation for opposing any practice that the employee ***reasonably believes*** to be a violation of Title VII") (emphasis added), *cert. denied*, 121 S. Ct. 657 (2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000) (observing that terms of opposition clause are met "if the plaintiff has a sincere and ***reasonable belief*** that he is opposing an unlawful practice") (emphasis added); *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982) (noting that in a retaliation case, "it is good faith ***and reasonableness***, not the fact of discrimination, that is the critical inquiry") (emphasis added); *Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 98, 100

(8th Cir. 1995) (stating that "[t]o demonstrate the presence of protected opposition, a plaintiff must show a good faith reasonable belief that his employer engaged in a discriminatory employment practice"), *cert. denied*, 517 U.S. 1104 (1996); *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 150 (8th Cir. 1981) (concluding that a person in the plaintiff's position could "reasonably have believed" that discrimination in violation of the law had occurred); *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994) (stating that the reasonableness of the plaintiff's belief that "an unlawful employment practice occurred must be assessed according to an objective standard"), *cert. denied sub nom. California Dept. of Corrections v. Moyo*, 513 U.S. 1081 (1995); *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988) (reasoning that "the opposition clause, by its terms, protects only those employees who oppose what they reasonably perceive as discrimination"), *cert. denied*, 489 U.S. 1079 (1989); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (reasoning that "[w]hen an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts").

The petitioner cites to an unpublished Tenth Circuit opinion, *Shinwari v. Raytheon Aircraft Co.*, 215 F.3d 1337, 2000 WL 731782 (10th Cir. June 8, 2000), *cert. denied*, 121 S. Ct. 843 (2001), which relies on a 1984 Tenth Circuit case, *Love v. Re/Max of Am., Inc.*, 738 F.2d 383 (10th Cir. 1984), in which that court summarily noted without analysis that other courts had concluded that "opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated" and then

"agree[d] that a good faith belief is sufficient" to state a retaliation claim under the opposition clause, even if the conduct opposed is not in fact unlawful. 738 F.2d at 385. Last year, in *Shinwari*, the Tenth Circuit confirmed that it applies only a subjective standard to the plaintiff's perceptions, not the "objectively reasonable" standard. 2000 WL 731782, at **5. Yet in the same year, the same court in another unpublished opinion, *Robben v. Runyon*, 203 F.3d 836, 2000 WL 123421 (10th Cir. Feb. 1, 2000), affirmed a district court that had reasoned that "[a] retaliation claim may be premised on adverse employment decisions which are in retaliation for opposition to discrimination, even if no discrimination in fact existed, so long as the plaintiff was motivated by an ***objectively reasonable belief*** the conduct was illegal." *Id.*, at **4 (emphasis added). And in yet another unpublished opinion, *Mann v. Hutchinson Public Schs.*, 202 F.3d 282, 1999 WL 1092594 (10th Cir. Nov. 23, 1999), the Tenth Circuit interpreted *Love v. Re/Max* as requiring the courts to apply an objective standard to the plaintiff's stated belief:

> To prevail on the first prong [of a *prima facie* case of retaliation], [the plaintiff] must show that she had a ***good faith, reasonable belief*** that she was being subjected to unlawful discrimination. *See Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) ("opposition activity" is protected even when based on mistaken good faith belief). Thus, [the plaintiff] must show that, at the time she told her supervisor . . . she thought he was discriminating against her, the actions she complained of were ones she ***reasonably*** could have believed had been taken due to her sex.

1999 WL 1092594, at **2 (emphasis added). Given that the standard the Tenth Circuit applied in *Robben* and *Mann* is the same standard that the district court applied to the petitioner's claim and is the same standard the majority of circuit courts apply, it can hardly be said that a "split" between the Tenth and Eleventh Circuits exists requiring this Court's intervention.

As the district court below concluded, Ms. Townsend's "belief" that she was not promoted to Reporter 4 because of "being a woman" was not objectively reasonable in light of the facts and record presented. *See Little*, 103 F.3d at 960. Ms. Townsend was barely acquainted with Gerardo Reyes, her so-called "comparator." She hardly knew what he did at *The Miami Herald*, a separate newspaper. Ms. Townsend's written performance evaluation reveals that, although she was considered a good reporter, she needed to improve her writing, leadership, and interpersonal skills. ***All*** of her editors said so. Thus, even if Ms. Townsend could have subjectively believed that her "sex" had something to do with not being promoted, a reasonable person in her position would have recognized that she didn't get a promotion because she didn't deserve one.

## III.

**The Eleventh Circuit, In Its Per Curiam Affirmance Without Opinion, Did Not Decide An "Important Question of Federal Law"**

For the same reasons that it cannot be said that a conflict exists between the decision of the Eleventh Circuit in this case and any other circuit court decision, it

cannot be said that the Eleventh Circuit in this case "decided" an important question of federal law concerning retaliation. The Eleventh Circuit wrote no opinion and thus it is not possible to tell what, if anything, it "decided." Moreover, as the cases cited in Point II make clear, federal circuit courts have – for two decades – applied the good faith, reasonable belief standard to retaliation claims brought under the opposition clause. Thus, even if it could be said that the Eleventh Circuit by inference approved the district court's application of this standard, the decision to apply an objective standard when determining whether a plaintiff has met her burden of proving a *prima facie* case of retaliation was made years ago – in other cases.

## CONCLUSION

For the foregoing reasons, Respondents ask that this Court deny the Petition.

Respectfully submitted,

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